Approved for Release: 2021/12/06 C06185525 F-2014-01381

LAW OFFICE OF JEFFREY L. LIGHT
1712 Eye St., NW, Suite 915
Washington, DC 20006
202-277-6213
Jeffrey.Light@yahoo.com

11 April 2014

Freedom of Information and Privacy Acts request:

To: Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

This is a request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. This request should be considered under both statutes to maximize the release of records.

REQUESTER INFORMATION

I represent Mr. Jason Leopold and Mr. Ryan Noah Shapiro (hereinafter "Requesters") and am submitting this FOIA request on their behalf. Although I am not the requester, I would appreciate it if communications could be directed to me at the address above.

APR 17 2014

Requestor 1:
Name: Jason Leopold
Address: (b)(6)
Email: (b)(6)

Requestor 2:
Name: Ryan Noah Shapiro
Affiliation: Doctoral Candidate, Massachusetts Institute of Technology
Address: (b)(6)
(b)(6)
Email: (b)(6)
Phone

Purpose of Request: Journalistic and scholarly research/Public dissemination of analysis of requested disclosure.

BACKGROUND INFORMATION

This request relates to an ongoing dispute between the Central Intelligence Agency (CIA) and the Senate Select Committee on Intelligence (SSCI) over the SSCI's review of the CIA's former Detention and Interrogation Program.

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The CIA and SSCI reached an agreement which would permit SSCI staffers to review CIA documents at a secure CIA facility in Virginia. A written agreement or series of agreements specified the parameters regarding the staffers' access to CIA documents.

The CIA has alleged that SSCI staffers illegally removed a document known as the Panetta Internal Review.

Senator Feinstein, Chair of the SSCI, has alleged that the CIA violated its written agreement with the SSCI and possibly violated criminal laws by searching SSCI computers located at the CIA facility in Virginia.

RECORDS SOUGHT

1. Requesters request a copy of all written agreements and correspondence between the SSCI (including Senators on the committee, their staff, and committee staff) and the CIA (or its agents, including contractors) which set forth the terms under which SSCI staffers would be permitted to access CIA documents at the secure CIA facility in Virginia. Your search should include, but not be limited to, the following systems of records: Congressional Liaison Records and Office of the Director Action Center Records.

2. Requesters request a copy of all records documenting any CIA investigation into the search of SSCI's computers at the secure facility in Virginia, including any records generated by the CIA's Inspector General in the course of any investigation; records referring the incident(s) to the Department of Justice for investigation; and correspondence between the SSCI (including Senators on the committee, their staff, and committee staff) and the CIA (or its agents, including contractors) which discuss the event. Your search should include, but not be limited to, the following systems of records: Congressional Liaison Records; Office of the Director Action Center Records; Inspector General Research Records; Inspector General Investigation and Interview Records; Security Access Records; and Security Operations Records.'"

3. Requesters request a copy of all records documenting any CIA investigation into the removal of the Panetta Review, including any records generated by the CIA's Inspector General in the course of any investigation; records referring the incident(s) to the Department of Justice for investigation; and correspondence between the SSCI (including Senators on the committee, their staff, and committee staff) and the CIA (or its agents, including contractors) which discuss the event. Your search should include, but not be limited to, the following systems of records: Congressional Liaison Records; Office of the Director Action Center Records; Inspector General Research Records; Inspector General Investigation and Interview Records; Security Access Records; and Security Operations Records.

4. Requesters request a copy of the contract, the request for proposal, proposal, bid

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solicitation, and bid for any CIA contractor responsible for reviewing records relating to the CIA's former Detention and Interrogation Program before access was provided to SSCI staff.

5. Requesters request a copy of any and all talking points (in draft and final form), and any and all guidance issued to the CIA's Office of Public Affairs, about the ongoing dispute between the Central Intelligence Agency (CIA) and the Senate Select Committee on Intelligence (SSCI) over the SSCI's review of the CIA's former Detention and Interrogation Program.

REQUEST FOR EXPEDITED PROCESSING

Under 32 C.F.R. 1900.34(c), a request is to be given expedited processing when "a compelling need is established to the satisfaction of the Agency." A compelling need is deemed to exist "[w]hen the request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." 32 C.F.R. 1900.34(c)(2).

Requesters are seeking expedited treatment for this request.

1. *The requested information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity.*

The requested information involves an actual Federal government activity --the CIA's detention and interrogation program and the agency's interaction with its congressional overseers who scrutinized this program– and there exists an urgent need to inform the public about this activity. There is an urgent need for the information requested because the records at issue may resolve possible questions about whether a constitutional crisis is now at stake between the Senate Select Committee on Intelligence and the CIA.

In a dramatic speech on the Senate floor on March 11, 2014, Senate Select Committee on Intelligence Chairwoman Dianne Feinstein in no uncertain terms accused the CIA of obstructing the Senate committee's review of the CIA interrogation and detention program. Senator Feinstein also said the search the CIA conducted of Senate investigators' computers "may well have violated the separation of powers principle embodied in the United States Constitution, including the speech and debate clause." Further, she said the CIA's actions

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may have undermined the constitutional framework essential to effective congressional oversight of intelligence activities or any other government function."[1]

Senator Lindsey Graham characterized the CIA's actions as "Richard Nixon stuff" and "dangerous to democracy and said "heads should roll" and "people should go to jail if it's true." [2]

House Minority Leader Nancy Pelosi said the CIA's behavior is in this dispute is a "matter of great seriousness" and ought to be of great concern to everyone. She added that when you take on the CIA "they come after you and don't always tell the truth." [3]

Additionally, the urgency of this request is underscored by the fact that yet another investigation directly connected to the dispute has been launched. On Thursday, March 20, 2014, Senate Majority Leader Harry Reid revealed that he has ordered the Senate's sergeant-at-arms to investigate how Senate staffers obtained internal CIA records at the center of the controversy that CIA Director John Brennan said was not authorized for release to Congress. [4]

Moreover, the declassification of the Senate study appears to be held up by the fact that the Intelligence Committee is engaged in this dispute with the CIA. Currently, military commissions are currently taking place at Guantanamo involving five 9/11 suspects, including Khalid Sheikh Mohammed ("KSM"), the alleged mastermind of the 9/11 attacks, and Abd al Rahim al Nashiri, the alleged mastermind of the USS Cole bombing. Nashiri and KSM were held in secret prisons operated by the CIA and were subjected to enhanced interrogation techniques described in the Senate's report. Any mention of their treatment while in custody of the CIA has been ruled to be off-limits by a military judge presiding over the tribunals, thereby depriving the public from knowing whether their admissions to alleged crimes were tainted by torture.[5] The release of the records revolving around the Senate controversy will help shed much needed light on what role the CIA has played in keeping this Senate report under wraps and whether the controversy surrounding the issue is connected to the military tribunals.

2. *Requesters are persons primarily engaged in disseminating information*

Jason Leopold is a full-time member of the news media as a contributor to Al Jazeera America,[6] an Editor at Large for the online publication, The Public Record,[7] and a widely

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[1] http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=db84e844-01bb-4eb6-b318-31486374a895

[2] http://www.star-telegram.com/2014/03/12/5644148/cia-vs-senate-is-a-real-mess-maybe.html

[3] http://www.theatlantic.com/politics/archive/2014/03/nancy-pelosi-when-legislators-take-on-the-cia-they-come-after-you/284524/

[4] http://www.politico.com/story/2014/03/harry-reid-cia-charges-v-senate-absurd-104853.html

[5] http://www.csmonitor.com/USA/Justice/2012/1212/9-11-trial-Any-mention-of-torture-is-classified-military-judge-rules

[6] http://america.aljazeera.com/profiles/l/jason-leopold.html

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published independent investigative reporter who has had his journalism published in dozens of domestic and international publications, and he is a person primarily engaged in disseminating information.

Ryan Shapiro is an ABD doctoral candidate in good standing at the Massachusetts Institute of Technology. He is in the PhD program in History, Anthropology, and Science, Technology, & Society (HASTS) in MIT's Department of Science, Technology, & Society. His research includes exploration of conflicts at the intersections of national security, law enforcement, surveillance, open government, and political dissent. He is a person primarily engaged in analyzing and disseminating information. To date, Mr. Shapiro has presented scholarly and popular lectures and talks pertaining to issues at the nexus of national security, social movements, and open government at institutions including the Massachusetts Institute of Technology, the National Institutes of Health (NIH), the Kennedy School of Government at Harvard University, the Max Planck Institute for the History of Science (Berlin), the University of California, Santa Barbara, the National Press Club (Washington, DC), the conference of the National Lawyers Guild, the History of Science Society, the Society for the Social History of Medicine, the Conference on Policy History, the American Society for Environmental History, Boston University, University College Cork (Ireland), and Suffolk University Law School. His upcoming scheduled speaking engagements for the month of April 2014 alone include Harvard Law School, Yale Law School, the City University of New York Law School, The College of William & Mary, The Base community center in Brooklyn, NY, and Burning Books bookstore in Buffalo, NY.

Additionally, Mr. Shapiro's scholarly research and related commentary on issues pertaining to the political functioning of national security, controversies involving access to information, and the policing of dissent, has been featured in numerous national and international media outlets. These outlets include, but are not limited to *The Washington Post, The Los Angeles Times, The Wall Street Journal, The International Business Times, NPR, BBC World Service, Agence France-Presse, Huffington Post, HuffPost Live, Salon, The Hill, Mother Jones, Democracy Now!, The Daily Beast, The Houston Chronicle, The Public Record, Fox Nation, MSN News, The Daily Mail, The Hollywood Reporter, Truth-Out, The Afro American, Green Is the New Red, FireDogLake, PolicyMic, Vice News, Boing Boing, The Verge, Tech Dirt, Freedom of the Press Foundation,* and *Al Jazeera America.*

Further, Mr. Shapiro is currently collaborating with (co-requester) award-winning journalist and author Jason Leopold on popular articles pertaining to issues of open government, the policing of dissent, and national security, including articles pertaining directly to the subjects of this FOIPA request.

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[7] www.pubrecord.org

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3. *Certification pursuant to 32 C.F.R. 1900.34(c)*

I certify the foregoing to be true and correct to the best of my knowledge and belief.

(b)(6)

Leopold, Ryan Noah Shapiro[8]

INSTRUCTIONS REGARDING SEARCH

1. *Instructions Regarding "Leads":*

As required by the relevant case law, the CIA should follow any leads it discovers during the conduct of its searches and perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

2. *Request for Public Records:*

Please search for any records even if they are already publicly available.

3. *Request for Electronic and Paper/Manual Searches:*

Requesters request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of my request be conducted. Requesters further request that the CIA conduct a search of its "soft files."

4. *Request for Search of Filing Systems, Indices, and Locations:*

Please search all of your indices, filing systems, and locations, including those Requesters have not specified by name and those of which Requesters may not be aware.

5. *Request regarding Photographs and other Visual Materials:*

Requesters request that any photographs or other visual materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. For

[8] Requesters have authorized me to sign the document on their behalf as their legal representative.

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example, if a photograph was taken digitally, or if the CIA maintains a photograph digitally, Requesters request disclosure of the original digital image file, not a reduced resolution version of that image file nor a printout and scan of that image file. Likewise, if a photograph was originally taken as a color photograph, Requesters request disclosure of that photograph as a color image, not a black and white image. Please contact me for any clarification on this point.

6. *Request for Duplicate Pages:*

Requesters request disclosure of any and all supposedly "duplicate" pages. Scholars analyze records not only for the information available on any given page, but also for the relationships between that information and information on pages surrounding it. As such, though certain pages may have been previously released to us, the existence of those pages within new context renders them functionally new pages. As such, the only way to properly analyze released information is to analyze that information within its proper context. Therefore, Requesters request disclosure of all "duplicate" pages.

7. *Request for Search of Operational Files:*

Requesters request that in conducting its search, the CIA include "operational files," as that term is defined in 50 U.S.C. § 431(b). Our request concerns a specific subject matter of an investigation by the Senate Select Committee on Intelligence, the Office of Inspector General of the Central Intelligence Agency, and the Department of Justice, and therefore the CIA's operational files encompassed within our request are not exempt from FOIA.

8. *Request to Search Emails:*

Please search for emails relating to the subject matter of our request.

9. *Request for Search of Records Transferred to Other Agencies:*

Requesters request that in conducting its search, the CIA disclose releasable records even if they are available publicly through other sources outside the CIA, such as NARA.

10. *Regarding Destroyed Records*

If any records responsive or potentially responsive to our request have been destroyed, our request includes, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

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INSTRUCTIONS REGARDING SCOPE AND BREADTH OF REQUESTS

Please interpret the scope of this request broadly. The CIA is instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought.

EXEMPTIONS AND SEGREGABILITY

Requesters call your attention to President Obama's 21 January 2009 Memorandum concerning the Freedom of Information Act, in which he states:

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA [....] The presumption of disclosure should be applied to all decisions involving FOIA.[9]

In the same Memorandum, President Obama added that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Finally, President Obama ordered that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nonetheless, if any responsive record or portion thereof is claimed to be exempt from production, FOIA/PA statutes provide that even if some of the requested material is properly exempt from mandatory disclosure, all segregable portions must be released. If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For "classified" material denied, please include the following information: the classification (confidential, secret or top secret); identity of the classifier; date or event for automatic declassification or classification review or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification beyond six years.

In excising material, please "black out" the material rather than "white out" or "cut out." Requesters expect, as provided by FOIA, that the remaining non-exempt portions of documents will be released.

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[9] President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," 21 January 2009; <http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.>

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Please release all pages regardless of the extent of excising, even if all that remains are the stationery headings or administrative markings.

In addition, Requesters ask that your agency exercise its discretion to release records which may be technically exempt, but where withholding serves no important public interest.

ADDITIONAL INSTRUCTIONS REGARDING REQUEST

Please produce all records with administrative markings and pagination included.

Please send a memo (copy to us) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

FORMAT

Requesters request that any releases stemming from this request be provided to me in digital format (soft-copy) on a compact disk or other like media.

FEE CATEGORY AND REQUEST FOR A FEE WAIVER

Requesters are willing to pay any reasonable expenses associated with this request, however, as the purpose of the requested disclosure is in full conformity with the statutory requirements for a waiver of fees, Requesters formally request such a waiver. Requesters request a waiver of all costs pursuant to 5 U.S.C. §552(a)(4)(A)(iii) ("Documents shall be furnished without any charge ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'").

Under 32 C.F.R. 1900.13(b), "Records will be furnished without charge or at a reduced rate whenever the Agency determines . . . (2) That it is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester."

Should our request for a fee waiver be denied, Requesters request that they be categorized as members of the news media for fee purposes pursuant to 32 C.F.R. 1900.02(h)(3). According to 5 U.S.C. § 552(a)(4)(A)(ii), which codified the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work,

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and distributes that work to an audience. This is consistent with the definition provided in 32 C.F.R. 1900.02(h)(3)

As the legislative history of FOIA reveals, "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); and 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, we, Jason Leopold and Ryan Shapiro, should be considered representatives of the news media.

The CIA's regulations list six factors which the agency must consider in assessing whether a requester is entitled to a fee waiver: "(i) Whether the subject of the request concerns the operations or activities of the United States Government; and, if so, (ii) Whether the disclosure of the requested documents is likely to contribute to an understanding of United States Government operations or activities; and, if so, (iii) Whether the disclosure of the requested documents will contribute to public understanding of United States Government operations or activities; and, if so, (iv) Whether the disclosure of the requested documents is likely to contribute significantly to public understanding of United States Government operations and activities; and (v) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so, (vi) Whether the disclosure is primarily in the commercial interest of the requester." 32 C.F.R. 1900.13(b)(2). Because the disclosure of the requested documents would contribute significantly to public understanding of United States Government operations and activities and I do not have a commercial interest in the requested disclosure, our request for a fee waiver must be granted.

I. DISCLOSURE OF THE REQUESTED RECORDS IS IN THE PUBLIC INTEREST BECAUSE IT IS LIKELY TO CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING OF THE OPERATIONS AND ACTIVITIES OF THE GOVERNMENT.

A. The subject of the requested records concerns the operations and activities of the CIA and broader government. The subject of the requested records concerns identifiable operations and activities of the CIA and broader government, specifically whether the CIA had violated an agreement in which the agency promised it would not monitor its computers and whether the records at issue are truly "deliberative" and "pre-decisional" as CIA Director John Brennan stated in a letter to Senator Dianne Feinstein in January 2014. [10]

[10] http://images.politico.com/global/2014/03/11/brennanltrrereview.html

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B. The disclosure is likely to contribute to an understanding of government operations and activities because the disclosable portions of the requested records will be meaningfully informative about those operations and activities. The vast majority of disclosable information is not already in the public domain, in either a duplicative or a substantially identical form, and therefore the disclosure would add substantial new information to the public's understanding of how the CIA and the Senate Intelligence Committee interacted during the course of the committee's investigation into the agency's detention and interrogation program and how the CIA viewed and reacted to congressional oversight.

The overwhelming preponderance of records Requesters need to conduct our study are in the possession of the CIA and not in the public domain.

C. The disclosure of the requested records will contribute to the increased understanding of a broad audience of persons interested in the subject, rather than merely our own individual understanding.

As explained herein in more detail, the audience likely to be interested in the subject is broad, and includes, historians of modern American government, politics, culture, and national security; journalists reporting on American politics, government, national security, and society; civil liberties attorneys; and the general public.

i) Requesters firmly intend to analyze the requested records in order to facilitate significant expansion of public understanding of government operations. Requesters are well qualified to perform this analysis.

I, Jason Leopold, spent three and a half years as lead investigative reporter of Truthout.org, a nonprofit newsroom. I am currently an investigative journalist under contract with Al Jazeera America. As a regular contributor to Al Jazeera America, I cover Guantanamo, national security, counterterrorism, civil liberties, human rights and open government. Additionally, I am editor-at-large for The Public Record. My reporting has previously appeared in The Nation, The Wall Street Journal, The Financial Times, Salon, CBS Marketwatch, The Los Angeles Times, and numerous other domestic and international publications.

I, Ryan Shapiro, I am an ABD doctoral candidate in good standing at the Massachusetts Institute of Technology. I am in my seventh year of the PhD program in History, Anthropology, and Science, Technology, & Society (HASTS) in MIT's acclaimed Department of Science, Technology, & Society. My research explores conflicts at the intersections of national security, law enforcement, open government, and political dissent.

I am particularly interested in the political functioning of national security in controversies involving access to information and political dissent. These issues are the core issues present in the requested records.

I have deep research and analytical experience in a broad range of pertinent scholarly disciplines and methodologies. Prior to my current position at MIT, I served as research assistant for the Deputy Chief of the History of Medicine Division of the National Library of Medicine at the National Institutes of Health (NIH) in Bethesda, MD, and also as the

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Assistant Director of Research for the Nuclear Studies Institute at American University in Washington, DC.

I am extensively trained in Modern American History. I hold an MA in Modern American History from American University, where I passed my MA qualifying exam in "Modern American History" with distinction. Additionally, at MIT, one of my three PhD qualifying exam fields in the HASTS doctoral program was "War, Science, & Society in 20th century American History." I have taught, lectured on, and assisted with teaching courses in Modern American History at the Massachusetts Institute of Technology, American University, and the University of California, Santa Barbara. For one example among many, in the Spring 2012 semester, I was the instructor for MIT's course, *American History since 1865* (21H.102).

I am also extensively trained in the fields of History of Science, the History of Medicine, Animal Studies, and Science, Technology, & Society. I have lectured and assisted with teaching courses on environmental history, scientific and ethical conflicts involving national security in the United States, bioethics, open government, and political dissent and the state. I have particularly extensive training and expertise in the history of American social movements, political dissent and repression in the United States, controversies over freedom of information and open government, and controversies at the intersections of the above and American national security.

I have extensive experience researching and analyzing large volumes of documents obtained through the Freedom of Information Act, including tens of thousands of pages released to me by the FBI, the ATF, NIH, USDA, the Department of the Army, the Department of Defense, the Unites States Coast Guard, and the National Archives and Records Administration.

My scholarly research has been funded by a host of elite academic and research institutions. These institutions include the Massachusetts Institute of Technology, where I was granted a Presidential Fellowship, as well as the University of California, American University, the Mellon Fund, and the Social Sciences Research Council.

In addition to my demonstrated ability to analyze the requested release in order to provide significant expansion of public knowledge of government operations, I also have the ability and firm intention to disseminate this significant expansion of public knowledge of government operations both within and outside academia. I will disseminate this significant expansion of public knowledge of government operations through the production of some combination of scholarly and popular articles, scholarly books, scholarly and popular lectures, provision of documents and expert analysis to journalists, and collaborations with journalists. This includes but is not limited to my above-noted collaboration with (co-requestor) journalist Jason Leopold.

My scholarly research and related commentary on issues pertaining to the political functioning of national security, controversies involving access to information, and the policing of dissent, has been featured in numerous national and international media outlets. These outlets include, but are not limited to *The Washington Post, The Los Angeles Times,*

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The Wall Street Journal, The International Business Times, NPR, BBC World Service, Agence France-Presse, Huffington Post, HuffPost Live, Salon, The Hill, Mother Jones, Democracy Now!, The Daily Beast, The Houston Chronicle, The Public Record, Fox Nation, MSN News, The Daily Mail, The Hollywood Reporter, Truth-Out, The Afro American, Green Is the New Red, FireDogLake, PolicyMic, Vice News, Boing Boing, The Verge, Tech Dirt, Freedom of the Press Foundation, and *Al Jazeera America.*

This coverage has frequently included not only my analysis of documents released to me through Freedom of Information Act requests and the broader political, social, and/or security implications thereof, but also publication of released documents themselves.

I have also co-curated an historical exhibit at NIH on an issue pertaining to national security and American social movements. The exhibit was held at the History of Medicine Division of the National Library of Medicine at NIH. I co-curated this exhibit with, and at the invitation of, the Deputy Chief of the History of Medicine Division of the National Library of Medicine.[11]

Additionally, I have presented scholarly and popular lectures pertaining to issues at the nexus of American national security, American social movements, and the freedom of information at numerous institutions. These institutions include, but are not limited to the Massachusetts Institute of Technology, the National Institutes of Health (NIH), the Kennedy School of Government at Harvard University, the Max Planck Institute for the History of Science (Berlin), the University of California, Santa Barbara, the National Press Club (Washington, DC), the conference of the National Lawyers Guild, the History of Science Society, the Society for the Social History of Medicine, the Conference on Policy History, the American Society for Environmental History, Boston University, University College Cork (Ireland), and Suffolk University Law School.

Further, my upcoming scheduled speaking engagements for the month of April 2014 alone include Harvard Law School, Yale Law School, the City University of New York Law School, The College of William & Mary, The Base community center in Brooklyn, NY, and Burning Books bookstore in Buffalo, NY.

As should be clear from the above, Requesters have the ability and firm intention to disseminate to the public significant expansions of understanding of government operations based on my analysis of the requested disclosures.

[11] See http://www.nlm.nih.gov/exhibition/animals/

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ii) Additional Note on Journalistic Research and the Public Interest:

The case law on this matter is emphatically clear that journalistic inquiry alone satisfies the FOIPA public interest requirement. *National Treasury Employees Union v. Griffin*, 811 F.2d, 644, 649 (D.C. Cir. 1987).

Further, as articulated in the amendments to FOIA established by the OPEN Government Act of 2007, Requesters solidly meet the applicable definition of "a representative of the news media[.]" The OPEN Government Act of 2007 established that for FOIA purposes,

> 'a representative of the news media' means any person or entity that gathers information of potential interest to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 552(a)(4)(A)(ii)

Based on our completed and firmly intended research, analysis, and information dissemination activities detailed at length herein, Requesters clearly satisfy this description.

Further, the OPEN Government Act of 2007's definition of "a representative of the news media" is taken nearly verbatim from language used by the United States Court of Appeals, District of Columbia Circuit in the court's 1989 FOIA fee waiver-oriented ruling in *National Security Archive v. Department of Defense*.[12] As the court also relatedly found in *National Security Archive v. Department of Defense*, a requester need not already have published numerous works in order to qualify as a representative of the news media. The court found that the express "intention" to publish or disseminate analysis of requested documents amply satisfies the above noted requirement for journalists to "publish or disseminat[e] information to the public." *National Security Archive v. Department of Defense*, 880 F.2d 1386, (D.C. Cir, 1989). Requesters have expressed a firm intention to continue disseminating significant analysis of documents obtained through FOIPA requests. And Requesters have demonstrated our ability to continue disseminating significant analysis of documents obtained through FOIPA requests.

Therefore, in that Requesters are "person[s] . . . that gather[] information of potential interest to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience," Requesters solidly meet the applicable definition of "a representative of the news media."

iii) Additional Note on Scholarly Historical Research and the Public Interest:

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[12] The language in *National Security Archive v. Department of Defense* reads, "A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience." *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir, 1989).

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Although Requesters have above provided extensive information supporting objectively reasonable arguments for the public interest of our request beyond that of scholarly interest alone, case law on this matter is emphatically clear that scholarly historical inquiry alone satisfies the FOIPA public interest requirement. *National Treasury Employees Union v. Griffin*, 258 U.S. App. D.C. 302 (D.C. Cir. 1987).

The courts have been equally clear that, in order to satisfy this public interest requirement, "the public" to be benefitted by release of records to a scholar need not be the entire public. Rather, it need only to be larger than the requester him or herself.

As the court ruled in *Ettlinger v. FBI*,

> *requested information need not benefit the entire public. Benefit to a population group of some size, which is distinct from the requester alone, is sufficient. Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

Requesters have herein substantially demonstrated that the population groups (scholarly and otherwise) benefited by our analysis of the requested release are far larger than ourselves alone.

D. The disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations and activities because disclosure would enhance to a significant extent the public's understanding of the subject in question as compared to the level of public understanding existing prior to the disclosure.

i) See above Section I.

ii) As noted above, the overwhelming preponderance of records Requesters need to conduct our study are in the possession of the CIA and not in the public domain.

II. DISCLOSURE OF THE INFORMATION IS NOT PRIMARILY IN OUR COMMERCIAL INTEREST.

Any commercial interest that Requesters have which would be furthered by the requested disclosure is *de minimis*.

Requesters are requesting the release of records to analyze for use in the dissemination of news and scholarly articles. Though journalists do get paid for writing news articles (though historians do not usually get paid for writing scholarly articles), payment is not the primary purpose for which such work is conducted. As the D.C. Circuit explained in *National Treasury Employees Union v. Griffin*, 811 F.2d, 644, 649 (D.C. Cir. 1987), "While private interests clearly drive journalists (and journals) in their search for news, they advance those interests almost exclusively by dissemination of news, so that the public

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benefit from news distribution necessarily rises with any private benefit. Thus it is reasonable to presume that furnishing journalists with information will primarily benefit the general public[.]"

Similarly, In *Campbell v. U.S. Dept. of Justice*, a case arising from a scholar's efforts to secure release of files pertaining to FBI investigations of author James Baldwin, the court held, "The fact that a bona fide scholar profits from his scholarly endeavors is insufficient to render his actions 'primarily commercial' for purposes of calculating a fee waiver, as Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles." *Campbell v. United States DOJ*, 164 F.3d 20 (1998).

Further, In *National Treasury Employees Union v. Griffin*, the court noted that the legislative history of the fee waiver provisions indicate "special solicitude" for journalists and scholars.

> The legislative history of the fee waiver provision indicates special solicitude for journalists, along with scholars and public interest groups. While private interests clearly drive journalists (and journals) in their search for news, they advance those interests almost exclusively by dissemination of news, so that the public benefit from news distribution necessarily rises with any private benefit. Thus it is reasonable to presume that furnishing journalists with information will primarily benefit the general public[.] *National Treasury Employees Union v. Griffin*, 811 F.2d, 644, 649 (D.C. Cir. 1987).

Similarly again, in *Ettlinger v. FBI*, a case involving a university professor seeking the release of FBI documents pertaining to investigations of members of a dissident political group, the court noted, "Though it is true that the plaintiff has some personal interest in the records sought, there is no indication whatsoever, nor do the defendants claim, that the plaintiff seeks those records solely with the intention of achieving commercial or private benefit." *Ettlinger v. FBI*, 596 F. Supp. 867, 880 (D. Mass. 1984).

The disclosure of records will significantly benefit the public interest, and this benefit to the public is of vastly greater magnitude than our minimal commercial interest.

The disclosure of records will significantly benefit the public interest, and this benefit to the public is of vastly greater magnitude than our minimal commercial interest.

Additionally, the courts and the legislature have been deeply invested in ensuring that FOIPA duplication and search fees are not used by government agencies to deliberately or otherwise thwart legitimate scholarly and journalistic research:

This was made clear in *Better Government Ass'n v. Department of State,* in which the court ruled that, "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage

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certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. Department of State*, 780 F.2d 86, 89 (D.C. Cir. 1986).

This point is further elaborated in *Ettlinger v. FBI*,

> The legislative history of the FOIA clearly indicates that Congress intended that the public interest standard for fee waivers embodied in 5 U.S.C. § 552(a)(4)(A) be liberally construed. In 1974, Congress added the fee waiver provision as an amendment to the FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests. The 1974 Senate Report and the sources relied on in it make it clear that the public interest/benefit test was consistently associated with requests from journalists, scholars and non-profit public interest groups. There was a clear message from Congress that "this public-interest standard should be liberally construed by the agencies." The 1974 Conference Report, in which differences between the House and Senate amendments were ironed out, retained the Senate-originated public-interest fee waiver standard and further stated "the conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." Further evidence of congressional intent regarding the granting of fee waivers comes from a 1980 Senate Subcommittee report. The report stated that "excessive fee charges . . . and refusal to waive fees in the public interest remain . . . 'toll gates' on the public access road to information." The report noted that "most agencies have also been too restrictive with regard to granting fee waivers for the indigent, news media, scholars . . ." and recommended that the Department of Justice develop guidelines to deal with these fee waiver problems. The report concluded: The guidelines should recommend that each agency authorize as part of its FOIA regulations fee waivers for the indigent, the news media, researchers, scholars, and non-profit public interest groups. The guidelines should note that the presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.

The court, in its *Ettlinger v. FBI* decision, continued that on 18 December 1980, a

> policy statement was sent to the heads of all federal departments and agencies accompanied by a cover memorandum from then United States Attorney General Civiletti which stated that he had "concluded that the Federal Government often fails to grant fee waivers under the Freedom of Information Act when requesters have demonstrated that sufficient public interest exists to support such waivers." The Attorney General went on to state: Examples of requesters who should ordinarily receive consideration of partial fee waivers, at minimum, would be representatives of the news media or public interest organizations, and historical researchers. *Such waivers should extend to both search and copying fees, and in appropriate cases, complete rather than partial waivers should be granted.*

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III. ALTERNATIVELY, THE AGENCY SHOULD EXERCISE ITS DISCRETION TO GRANT A FEE WAIVER.

Although Requesters are entitled to a waiver of fees under 32 C.F.R. 1900.13(b)(2), even if Requesters were not entitled to fees under that provision, the agency should grant Requesters a fee waiver in the exercise of its discretion. Pursuant to 32 C.F.R. 1900.13(b)(1), "as a matter of administrative discretion, the interest of the United States Government would be served." The agency should exercise its discretion here to award a fee waiver because release of the documents would be in the interest of the United States Government for the reasons stated above.

IV. CONCLUSION.

As demonstrated above, the disclosure of the requested records will significantly contribute to expanded public understanding of government operations. Requesters have the intent and ability to disseminate this significant expansion of public understanding of government operations. The public interest in this significant expansion of public understanding of government operations far outweighs any commercial interest of our own in the requested release. Accordingly, our fee waiver request amply satisfies the rules of 32 C.F.R. 1900.13(b). Legislative history and judicial authority emphatically support this determination. For these reasons, and based upon their extensive elaboration above, Requesters request a full waiver of fees be granted. Requesters will appeal any denial of our request for a waiver of fees, and will take the issue to the courts if necessary.

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Please do not hesitate to contact me if you have any questions concerning this request.

Thank you Requesters and I appreciate your time and attention to this matter.

(b)(6)

Jeff
Co n Leopold and Ryan Noah Shapiro

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